IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 40 OF 2002.

Shri Shankar Chikanawar,
s/o Yellappa Chinkanawar,
Central Jail, Aguada. ... Appellant.

Versus

State, Secretariat, Panaji. ... Respondent.

Mr. S.G. Bhobe, Advocate under Legal Aid Scheme for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 18th July 2003.

ORAL JUDGMENT.

The appellant/original accused has filed this appeal challenging the conviction for offences punishable under Sections 304(I) and 324 of the Indian Penal Code and sentences of rigorous imprisonment for 10 years and to pay fine of Rs. 1,000/-, in default simple imprisonment for 6 months and to pay fine of Rs. 500/-, in default simple imprisonment for 1 month respectively, passed by the Sessions Judge, Margao, Goa, by Judgment, dated 10th July 2002, in Sessions Case No. 36 of 1999.

2. The facts, as are necessary for the decision of the appeal, are stated hereunder:

P.W.15 P.S.I. Asish Shirodkar was attached to the Verna Police Station in June 1999. Shri Sail,

Police Inspector, who died on 25th June 1999, recorded the complaint at Exhibit 7. The complaint was filed by P.W.1 Mahendra Bharad at 9.35 p.m.. On the next day, Shri Sail P.I., conducted the inquest panchanama, at the Goa Medical College, vide Exhibit 10, in the presence of P.W.2 Bhoj Naik. He also conducted the attachment panchanama of the clothes of the deceased, vide Exhibit 11, in the presence of P.W.2 Bhoj. The accused was arrested on 6th June 1999, vide arrest panchanama at Exhibit 27, in the presence of P.W.6 Antonio Gama. On 7th June 1999, P.W. 15 P.S.I. Shirodkar conducted the scene of offence panchanama, at Exhibit 18, in the presence of P.W.4 Sandeep Vernekar. Two rubble stones were attached. On the same day, Shri Sail P.I., conducted an attachment panchanama of the clothes of P.W.11 Arogya Das, in the presence of P.W.3 Joao D'Sa. The post-mortem on the dead body was performed by P.W. 5 Dr. Silvano Sapeco and the post-mortem report is at Exhibit 22. The weapon of offence was sent for examination to P.W.5 Dr. Sapeco and the report of the examination of the weapon is at Exhibit 25. The accused is alleged to have made a discovery memorandum, at Exhibit 29, in the presence of P.W.7 Paulo Gama. The learned trial Court has rejected the discovery of the knife. The accused is alleged to have injuries on his tongue and was examined by P.W. 13 Dr. Vijaya Halankar and the Hurt Certificate is at Exhibit 45. The accused

was examined by P.W.14 Dr. Avinash Pujari, who determined his blood group. The blood group of the accused was determined as B Rh Positive. The report of the Chemical Analyser is at Exhibit 53. After completion of the investigation a charge-sheet against the accused came to be filed.

3. The learned Sessions Judge, Margao, vide Exhibit 4, framed a charge against the accused. The accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 15 witnesses, out of which P.W.9 Deepak Naik and P.W. 10 Anthony Raj are the eye witnesses and P.W.11 Arogya Das is the injured eye witness. The defence of the accused was of denial. The learned trial Court accepting the evidence of the two eye witnesses including the evidence of the injured eye witness arrived at a finding that the offences against the accused had been proved beyond reasonable doubt and, therefore, convicted and sentenced the accused as aforestated.

4. Mr. Bhobe has been appointed as a counsel for the appellant from the Legal Aid Panel and, at the outset, I must record my appreciation for the efforts taken by the learned counsel and the valuable assistance rendered to this Court in deciding this appeal.

5. Mr. Bhobe, the learned counsel for the accused, has assailed the evidence of the three eye witnesses and has pointed various contradictions in their testimonies. According to the learned counsel for the accused, the inter se contradictions are on material and vital aspect of the testimonies of the witnesses and cannot be ignored or brushed aside as the inter se contradictions coupled with the absence of corroboration from the medical evidence punches big gaping holes in the fabric of its case as woven by the prosecution. Let me, therefore, first examine the evidence of the eye witnesses.

6. P.W.11 Arogya Das is the injured witness. He states that he and Dominic Savio were residing at Chicalim and were doing the work of breaking stones. He knows Arogya Swamy, who was residing at Verna and was also doing the work of breaking stones. He came to know the appellant/accused on the day of the incident. The appellant/accused was also doing the work of breaking stones. On the date of the incident, being Sunday, he had a holiday and, accordingly, had gone to Verna alongwith Dominic to meet Arogya Swamy. They reached Verna at about 1.00 p.m.. While he was having his lunch, Dominic was sitting outside the hut of Arogya Swamy. The appellant/accused came there and asked Dominic as to who had called him there. Dominic replied

stating as to who the accused was to question Dominic. The accused caught hold of the shirt of Dominic and, thereafter, Dominic gave a fist blow on the face of the accused, as a result of which, the accused had a bleeding injury. According to this witness, the accused received an injury, as a result of his tongue coming in between his teeth. The accused then went to the hut of one Ambrose and showed the said Ambrose the said injury and also complained to the said Ambrose regarding the assault. The accused, thereafter, picked up a coita (scythe), which was lying outside the hut of Arogya Swamy and dealt a blow on Dominic with the said coita. P.W.11 Arogya Das rushed to intervene, but, the accused dealt a blow with the coita on the back of the head of Arogya Das, as a result of which he received a bleeding injury. P.W.11 Arogya then snatched the coita from the hands of the accused and hurled it in the nearby bushes. Dominic started running with the accused chasing him. Dominic fell down on the ground and the accused lifted a big stone and hit the same on the back of Dominic, as Dominic had fallen face down. The accused is alleged to have hit about 2 to 3 stones on the back of Dominic. Hearing the cries of Dominic some persons from the vicinity came there and the accused took to his heels. P.W.11 Arogya carried the injured Dominic on his back to the bus stop, which is popularly known as Titan bus stop. According to P.W. 11 Arogya, neither a rickshaw

was willing to take Dominic to the place of residence of P.W.11 Arogya nor a passing bus stopped. According to P.W.11 Arogya his shirt and the clothes of Dominic were stained with blood. Strangely P.W.11 Arogya states that he told the injured Dominic to either stay or sleep at the bus stop while P.W.11 Arogya would go to his hut at Chicalim to bring clothes in order to go to the hospital. P.W 11 Arogya removed his shirt and left the same at the place where Dominic lay and went by bus to his hut at Chicalim. When he returned Dominic was not present at the place where he had left him. He, therefore, took his shirt and went back to Chicalim. On reaching Chicalim, he fainted and went to sleep. Next morning P.W.1 Mahendra, boss of Arogya Swamy and the accused, came to his hut accompanied by policemen and took him to the hospital at Bambolim and to the scene of offence. He has identified the coita as M.O.4 and his clothes, seized by the police, as Exhibits 5 and 5a.

7. In the cross-examination he has admitted that the police had questioned him in the hospital. He further states that it was the first time he visited the hut of Arogya Swamy. He was sitting inside the hut eating his lunch. Dominic was outside with Anthony. At the scene of the offence there are six huts. Three in the front and three at the rear. By the side of the hut of Arogya Swamy, the hut of Ambrose is situated. The

hut of the accused is situated behind the hut of Arogya Swamy. Arogya Swamy was sleeping inside his hut but, he could not say whether he had consumed liquor. Arogya Swamy's wife and sister were also present in the hut. The coita was lying outside the hut and had been used previously for breaking the coconut. When accused dealt the blow with the coita, Dominic and the accused were facing each other. He further states that the accused had delivered only one blow with the coita and the blow was delivered when Dominic was outside the hut. Contradiction was brought on record that, after the blow was delivered, Dominic started running. He states that the said portion has not been correctly recorded. He has also stated that it was not correctly recorded that the accused started chasing Dominic and after chasing him for a distance of 150 metres dealt a blow with the coita on the stomach of Dominic. He also states that the stones were thrown after Dominic fell down and not while he was running. The stones were of 8 to 10 inches in diameter. It took him about half an hour to take Dominic to the bus stop. He states that he had kept Dominic at the bus stop at about 4 p.m.. The incident had occurred between 1.00 to 2.00 p.m. and he had left the bus stop at 5.30 to 6.00 p.m. for going to his hut. He was asked the following question:

> "Q. Where was Dominic between 2 and 4 p.m.?
> Ans. I was taking him slowly.".

Surprisingly he states that for the whole night he did not bother to find out what had happened to Dominic.

8. P.W.9 Deepak Naik states that on the day of the incident he was sleeping. His wife woke him and informed him that there was a quarrel between Dominic and the accused. He came out of his hut and saw Dominic running towards the Industrial Estate being chased by the accused with a coita in his hand. While running, Dominic fell down. The accused then hit a stone on the head of Dominic and dealt a blow with the coita on the stomach. Thereafter the accused hit the coita on the head of the friend of Dominic, who was following them. Both had suffered bleeding injuries. The friend of Dominic then carried him on his shoulder. This witness then states that he changed his clothes and went to telephone P.W.1 Mahendra Bharad, who was his boss. P.W.1 Mahendra had gone out and, therefore, this witness could not contact him. However, P.W.1 Mahendra came to the place at about 7 p.m. and took P.W. 10 Anthony with him and went in search of Dominic. When the coita was shown, this witness stated that it was not the same coita in the hands of the accused. In the cross-examination he states that his statement was recorded by the police on 7th at 7.00 p.m. He further states that on 7th he had learnt at 9.00 a.m. that

Dominic had died but had not reported the incident on 6th. He had also not stated about the incident to any one except P.W.1 Mahendra. He has further stated that he saw Dominic running with the accused chasing him and the friend of Dominic running behind them, when he came out of the hut, on being woken by his wife. He has stated that the accused threw the stone after Dominic fell down. He has denied to have stated that the accused threw the stone, as a result of which, Dominic fell down. He has stated that he saw the accused assaulting with the coita from a distance of 40 to 50 metres. The stones with which the Accused hit were of the diameter of 8 to 10 inches. One stone was hit on the back of the head of Dominic, while two stones were hit on his back. The coita fell from the hands of the accused when Dominic fell on the ground. He denies to have stated in his statement that Dominic got up again and started running with the accused chasing him. He has denied to have stated that the accused threw a stone at Dominic when he started running. Omission was brought in his statement regarding telephoning P.W.1 Mahendra. He then states that the friend of Dominic was not assaulted with coita but with a small stone when he snatched the coita from the hand of the accused. Contradiction was brought out regarding this witness stating that Dominic fell down, as a result of the stone thrown at him, by the accused. He has also gone to the

extent of describing the make and the colour of the slippers worn by the deceased and the accused. He has described the stones thrown by the accused at Dominic as being 8 to 10 inches in size. He had reached the place where Dominic was lying within 2 to 3 minutes of the incident. He left Dominic at the scene and returned to his hut. Contradiction was brought out regarding this witness stating that thereafter Dominic began running, which he denied to have stated.

9. P.W.10 Anthony Raj is another eye witness to the incident. He states that he knew deceased Dominic. His father was employed by P.W.1 Mahendra. He further states that Dominic had come to meet his father. Dominic had come to their hut. He further states that his father had bought mutton and he was asked to break a coconut with a coita. He broke the coconut and kept the coita outside. At about 2.00 p.m. accused came to his hut and started quarrelling with Dominic. Anthony Raj further states that his father had consumed liquor and was, therefore, sleeping. The accused caught the shirt of Dominic and Dominic gave a fist blow on the face of the accused. Some one had intervened but the accused went to his hut and the accused was bleeding from his mouth. The accused again came towards their hut and picked the coita lying outside the hut of P.W.10 Anthony and hit the coita on the stomach of Dominic. Arogya Das

intervened but the accused hit the coita on the head of Arogya Das. Arogya Das then ran away. Dominic fell on the ground and the accused threw stones at Dominic. Accused then started quarrelling with the father of P.W. 10 Anthony. Arogya Das then lifted Dominic and took him towards the bus stop. Thereafter, P.W.10 Anthony alongwith P.W.9 Deepak alias Murugesh went to the house of P.W.1 Mahendra. According to him, they met Bharad and narrated the entire incident to him. Bharad promised to come. Bharad (P.W.1 Mahendra) came at 6.00 p.m.. According to Anthony he went alongwith Bharad to the place where Dominic was sleeping and Dominic was made to sit on the scooter in between him and Bharad. Dominic was not talking, though he was alive. In the hospital Dominic was pronounced dead. P.W.1 Mahendra returned and took accused to the police station.

10. In the cross examination he has admitted that accused came there after half an hour of them sitting outside the hut. The accused did not talk to any one but straight away caught the shirt of Dominic. There was no talk between the accused and Dominic. He has admitted to have stated in his statement that accused came and started quarrelling with Dominic. He was asked the following question:

"Q. After how long did Shankar caught the shirt of Dominic after the quarrel?
Ans. There was no quarrel between them.".

11. He has further admitted that he did not hear the talk between the accused and Dominic as he had gone inside to give the coconut. Arogya only stated "Chod Chod", but did not do anything. He has also admitted that Arogya did not try to separate Dominic and the accused. He has admitted to have stated in his statement to the contrary. According to him, when the accused lifted the coita, Dominic started running and he ran 6 to 7 metres. Accused started chasing him. Arogya followed the accused. Arogya caught the accused and the accused dealt the coita blow on the head of Arogya. Arogya fell down and the accused assaulted Dominic with the coita. According to him, when Dominic was hit by a coita he was at some distance from the hut. He was confronted with the contradiction in his statement that the coita was hit outside the hut. An omission was brought on record regarding Dominic running. The stones were thrown at Dominic with force. P.W.10 Anthony has further admitted that Murugesh (P.W.9 Deepak) had first telephoned Bharad and he was present with Murugesh when he had telephoned.

12. This witness is falsified by P.W.9 Deepak when Deepak states that he had telephoned Bharad but Bharad was not available. Deepak does not speak about the presence of P.W.10 Anthony at that time. Deepak also does not speak about going to the house of Bharad and

informing him about the entire incident.

13. P.W. 12 Meenakshi Naik, wife of P.W. 9 Deepak, states that on the day of the incident she was sweeping the room. Her daughter was playing outside and Murgesh was sleeping inside the hut. She heard the daughter of the accused telling the wife of the accused that there was fight between the accused and one boy. She came out of her hut and saw one boy running, being chased by the accused. The boy, who was running, fell down and the accused threw 2 stones on the back of the boy who had fallen. Thereafter, another boy came and took the injured boy on his shoulder towards the factory. In the cross-examination she has admitted that the fight took place outside the hut of Amresh. She had not heard anyone talking loudly. She did not see anything in the hand of the accused. She had seen the accused throwing the stones on the back of the boy, who had fallen. Both the stones were hit at the same spot.

14. P.W.1 Mahendra Bharad states that P.W. 9 Murgesh (also known as Deepak) came to his house at 5.30 p.m. and told him that there had been a fight at the construction site between the deceased and the accused. He further told him that the accused had received a cut on his tongue and deceased Dominic was injured. P.W.1 Mahendra alongwith P.W.9 Deepak came to the site and met

the accused. P.W.1 Mahendra asked the accused what had happened and the accused showed the tongue and informed that Dominic had hit him on the tongue with a blade. There was one boy named Raja and he informed that Dominic was also injured and P.W.1 Mahendra should go and see Dominic at the Titan bus stop. P.W. 1 Mahendra and Raja went to the Titan bus stop where Dominic was lying. P.W.1 Mahendra found the clothes of Dominic stained with blood. Dominic requested to be taken to a Doctor. With the assistance of Raja, Dominic was made to sit in between P.W.1 Mahendra and Raja on the scooter. P.W.1 Mahendra went to the Goa Medical College at Bambolim. On the way Dominic told him that there was a fight between him and the accused and the accused had assaulted him. On examination at the Medical College, Dominic was pronounced as dead. P.W.1 Mahendra and Raja returned and found the accused lying in front of his hut. P.W.1 Mahendra did not disclose to the accused about the death of Dominic and asked the accused to accompany him to the police station for lodging a report. The accused accepted to accompany. P.W.1 Mahendra took the accused to the Verna Police Station and lodged the complaint at Exhibit 7.

15. In the cross-examination he has admitted that he had left the G.M.C. hospital after the doctor told him that Dominic was dead and that was around 7.00 p.m.

He has further admitted that he reached Verna around 7.30 p.m. He has also admitted that he did not make any further enquiry but straight took the accused on his scooter to the Verna Police Station. In the report Exhibit 7, it is stated that "On the way I enquired with Dominic, he told me that Shankar assaulted to him at 14.30 hrs. near the hut." The report further recites that "As said Shankar assaulted Domnick r/o Sancoale with rubble stone due to which he died on the way to hospital. I lodge the complaint against him.". The version of P.W.1 Mahendra that the deceased Dominic had disclosed to him that he was assaulted by the accused is completely falsified by the admission of P.W.10 Anthony Raj, who had accompanied Mahendra on the scooter, that the deceased Dominic was not talking, though he was alive. According to P.W.10 Anthony Raj, he had informed P.W.1 Mahendra Bharad about the entire incident. It is, therefore, inexplicable as to why Exhibit 7 is silent regarding the use of coita to inflict the injury and refers only to rubble stones.

16. It is true that when prosecution examines eye witnesses there are bound to be minor contradictiions inter se in the testimonies of the eye witnesses. The minor discrepancies are natural and need not be viewed with suspicion. The capacity of a witness to recapitulate and narrate the incident differ from person

to person and in such situations discrepancies arise in the testimonies of the witnesses. Minor discrepancies, particularly on the peripheral aspect of the prosecution case lend an assurance to the Court about the truthfulness of the version deposed to by the witnesses. However, major discrepancies affecting the substratum of the prosecution case makes the Judge cautious and the endeavour should always be to separate the "grain from the chaff", the truth from falsehood. In such an exercise the Court would be justified in jettisoning the testimonies of certain witnesses or relying on part of the testimonies of the witnesses. This exercise is not possible if the truth and falsehood are so intermingled and intertwined that the grain cannot be separated from the chaff. The only alternative for the Court is then to disbelieve the testimonies giving the benefit of doubt to the accused. In the present case, it is impossible to separate the truth from falsehood. Acceptance of the evidence of one witness necessarily entails the rejection of the other. There are discrepancies, not only on minor aspects of their evidence, but, the discrepancies are replete on the major aspects, particularly the assault by the accused on the deceased. I have adverted in detail to the evidence of the eye witnesses and the discrepancies are irreconcilable with the testimonies of each of the eye witnesses. I have, therefore, no other alternative

but to discard the testimonies of the eye witnesses.

17. The evidence of the eye witnesses is also not corroborated by the medical evidence. The post-mortem examination was conducted by P.W.5 Dr. Silvano Sapeco. He noticed the following injuries:-

> " 1. A deep cut on the right inguinal region, placed obliquely having 1 1/4 x 1/2 x 7 cms. deep. the anterior end is 7 cms. from right superior anterior iliac spine. The posterior end is 5cms. from symphyses pubes. Both ends are less acutely cut and have clean cut margins.
>
> 2. Cut injury with less acute end and clean cut margin of 1/4 x 1/4 x 3 cms. on left outer aspect of elbow.
>
> 3. Abrasion of 4 x 3 cms. on right inner aspect of the ankle.
>
> 4. Grazed abrasional laceration of 2 x 1/4 x 1/4 cms. on outer aspect of left big toe.
>
> 5. Contused lacerated wound of 3 x 1/4 x 1/4 cms. on left parietal eminence of scalp 10 cms. above insertion of ear pinna."

18. According to him, the injuries at serial nos. 3 and 4 could be caused with a stone. However, P.W.5 Dr. Sapeco did not notice any injuries caused with a stone on the back of the deceased. All the eye witnesses have, in unison, stated that stones were hit on the back of the deceased. Injuries ought to have been seen on the back of the deceased where the stones had hit. Absence of injuries would suggest that the

witnesses have not seen the incident. P.W.13 Dr. Vijaya examined the accused on 6th June 1999 at 11.15 p.m. She found that the accused had one incised wound on the anterior 1/3rd tongue of size 2 1/2 cms. x 1/4 cm.. He had another injury at the same place of size 1 cm. x 1/4 cm. x 1/4 cm.. According to her the injuries were caused by a sharp weapon. The arrest panchanama of the accused at Exhibit 27 commenced at 11.15 and concluded at 11.50 p.m.. It is inexplicable as to how the accused could be in the police station and in the hospital at the same time. There is no explanation worth the name tendered by the prosecution. P.W. 13 Dr. Vijaya has further stated that if a blow had been given it should have been associated with other injuries. She did not find other injuries on the face of the accused.

19. The prosecution witnesses by their discrepant testimonies have denuded themselves of the status of reliable witnesses. The injuries on the tongue of the accused also do not corroborate the testimonies of the eye witnesses. P.W. 13 Dr. Vijaya positively rules out the accused receiving the injuries in the manner stated by the prosecution witnesses. Mere presence of the injuries on the tongue of the accused in the absence of any other reliable and cogent evidence is not sufficient for conviction. The accused, therefore,

according to me, is entitled to be acquitted.

20. In the result the Criminal Appeal is allowed. The conviction of the appellant/accused for offences punishable under Sections 304(1) and 324 of the Indian Penal Code and sentences of 10 years rigorous imprisonment and one month simple imprisonment respectively, passed by the Sessions Judge, South Goa, Margao, by Judgment, dated 10th July 2002, in Sessions Case No. 36 of 1999, is, hereby, quashed and set aside and the appellant/accused is acquitted of the aforesaid offences. The appellant/accused be released forthwith, if not wanted in any other case. Fine, if paid, be refunded to the appellant/accused.

(P.V. HARDAS)
JUDGE

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